95-1094

FILED
DEC 11 1995
CLERK

NO. _____

In The
Supreme Court of The United States
October Term 1995

DARLENE BANFIELD, Executrix of the Estate of of Harlow F. Banfield; et al.,

Petitioners,

v.

KENNETH W. TURNER, et al.,

Respondent.

Petition For A Writ Of Certiorari From The United States Court of Appeals For The Sixth Circuit

---

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

***William Paul McGuire**
William Paul McGuire Co., L.P.A.
Bank One Building, Suite 705
106 East Market Street
Post Office Box 1243
Warren, OH 44482

(216) 392-8800

***Counsel of Record**

LEGAL ADVANTAGE - Advocates in Appellate Services
432 Walnut Street * Suite 200 * Cincinnati, OH 45202
(800) 581-2252

INDEX TO APPENDIX

		Appendix Page No.
A.	Opinion Below	A1 . 1
B.	Other Opinions	B1 . 24
C.	Order Denying Rehearing . .	C1 . 36
D.	Text of Cited Authorities .	D1 . 37
E.	Other Materials	E1 . 40
	(i) Turner admission of assigned income	40
	(ii) Discovery Request	41
	(iii) Moskal Jaras Report.	46
	(iv) Feldman Deposition	51
	(v) Request for documents.	53
	(vi) Tax Shelter Plan Proposal. . .	57
	(vii) Dr. Banfield's 1976 Form 1040.	62
	(viii) Miller Deposition.	63
	(ix) Ltd Summary Judgement Issues .	75
	(x) Petition for Rehearing	92
	(xi) Gallagher Deposition	99
	(xii) Herr Affidavit	.103
	(xiii) Jaras Affidavit.	.107
	(xiv) Banfield Affidavit	.114

APPENDIX A

OPINION BELOW

Excerpted below the unpublished per curiam Opinion of the United States Court of Appeals for the Sixth Circuit in the appeal Darlene Banfield v. Kenneth W. Turner, et al., Record No. 94-3663, 94-3864, and decided September 12, 1995, before RYAN, BATCHELDER and MOORE, Circuit Judges. KAREN NELSON MOORE, Circuit Judge.

William Paul McGuire on behalf of Darlene Banfield, and Bernard Fineman argued on behalf of Kenneth W. Turner; Lawrence Springer on behalf of William L. Miller, Peter Visnic, and Crable, Visnic & Miller; and John C. Cubar on behalf of Francis P. Gallagher on behalf of

Thompson Plan Administration Company; on behalf of Peter Visnic; Crable, Visnic & Miller.

BEFORE: RYAN, BATCHELDER and MOORE, Circuit Judges.

KAREN NELSON MOORE, Circuit Judge. Plaintiffs appeal from the district court's order granting summary judgment to all defendants in this case, which involves claims of breach of fiduciary duty under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. Sections 1001-1461. Plaintiffs also appeal from the district court's order denying their Rule 60(b) motion. We affirm the district court's orders.

I.

Darlene Banfield ("Mrs. Banfield") sued Dr. Kenneth W. Turner ("Turner"); Francis P. Gallagher ("Gallagher"); Thompson Plan Administration Company ("TPA"); William L. Miller ("Miller"); Peter Visnic ("Visnic"); and Crable, Miller & Visnic ("CMV") for alleged violations of their fiduciary duties under ERISA. Mrs. Banfield sued both in her capacities as executrix of her late husband's estate and as a beneficiary of his pension plan.

Dr. Harlow F. Banfield ("Dr. Banfield"), Mrs. Banfield's late husband, owned half of an incorporated medical practice called Anesthesiology Associates of East Liverpool, Ohio, Inc. ("AAELO").

Defendant Turner owned the other half of AAELO. Dr. Banfield also had a separate private medical practice. AAELO established two defined benefit pension plans in which both doctors participated and in which both doctors were named fiduciaries. Both doctors had to sign any checks drawn on the pension fund. Dr. Banfield apparently contributed income from his separate private practice into the AAELO fund. Mrs. Banfield alleges that Dr. Banfield contributed a total of $272,384 from his private practice income to the AAELO pension plans.

Defendants Miller, Visnic, and CMV provided accounting services to the AAELO plans. The accounting services included

tax return preparation and plan financial statements, participant disclosure statements, and actuarial statements. Defendants Gallagher and TPA provided administrative services to the AAELO plans.

Dr. Banfield retired from AAELO on October 29, 1988, and began receiving monthly payments from both plans. After Dr. Banfield's death on February 17, 1989, Mrs. Banfield continued to receive payments from the pension plans until April 1991. Mr. Banfield apparently became suspicious that she had not received all of the money to which she was entitled under the plans, because she hired the actuarial firm of Moskal, Jaras & Klein ("Moskal") to audit the plans.

Moskal concluded in its report to Mrs. Banfield that Dr. Banfield had received a percentage of the plans' benefits equal to the percentage of his contributions, which allocation was proper. The Moskal report also found that "[t]he private practice income did flow through to the pension plans." Mrs. Banfield's complaint contains three causes of action, all involving alleged breaches of fiduciary duty, and fraud against all defendants. The first cause of action also alleges that all defendants misappropriated Dr. Banfield's private practice income contributions. The second cause of action alleges that all defendants purchased an annuity for Turner in breach of their fiduciary duty

of independence. The third cause of action alleges that Turner, Miller and CMV breached their fiduciary duties by failing to collect repayment of loans made to Turner from the plan funds and allowing Dr. Banfield to make illegal contributions to the pension plans.

Defendants Miller, Visnic, Gallagher, TPA, and CMV based their motion for summary judgment on the ground that they were not fiduciaries under the plan and thus had no liability under ERISA. Defendant Turner moved for summary judgment on the ground that, although he was a fiduciary under ERISA, his actions with regard to the plan were reasonable and not arbitrary or capricious, and that he therefore could

not be held liable under ERISA.

The district court granted all of the defendant's motions for summary judgment. Although the district court found that there was a genuine issue of material fact about whether defendants Gallagher and TPA were fiduciaries, it held that summary judgment in favor of all defendants was appropriate because Mrs. Banfield had presented no evidence of fraud, misappropriation, breach of contract, or arbitrary and capricious action, and thus Mrs. Banfield had not met her burden of showing a genuine issue of material fact.

The district court's granting of summary judgment is reviewed de novo. Guarino v. Brookfield Township Trustees,

980 F.2d 399, 403 (6th Cir. 1992). An appellate court uses the same test used by the district court for determining whether summary judgment should be granted under Fed. R. Civ. P. 56(c), which requires that summary judgment must be granted if the pleadings, depositions, and affidavits on file show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party is entitled to summary judgment if it shows that the non-moving party has failed to establish an essential element of its case upon which it would bear the ultimate burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317,322 (1986). In

order to avoid suffering summary judgment, the non-moving party must come forward with specific fact showing that there are genuine issue for trial and that the record, taken as a whole, could lead a rational trier of fact to find for the non-moving party. Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The non-moving party cannot rest on its pleadings, but must present supporting evidence on issue upon which it has the burden of proof. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). The evidence submitted by the non-moving party must be sufficient for a jury to be able to decide in its favor on those issues at trial. Guarino, 980 F.2d at 403; Coffey

v. Foamex L.P., 2 F.3d 157, 159 (6th Cir. 1993). However, the evidence and all inferences to be drawn from it must be construed in the light most favorable to the non-moving party. Kraus v. Sobel Corrugated Containers, Inc., 915 F.2d 277, 299 (6th Cir. 1990).

The district court was correct that Mrs. Banfield has not shown a genuine issue of material fact on the allegations of breach of fiduciary duty. The defendants supported their summary judgment motions with affidavits and deposition testimony. Defendant Turner supported his motion with the Moskal report. The Moskal report, which was commissioned by Mrs. Banfield, expressly stated that the private practice income

"flowed through" the pension plans and that Dr. Banfield received that to which he was entitled.

Mrs. Banfield presented no evidence that any fraud, breach of contract, or misappropriation occurred. She referenced deposition testimony in her response to the defendants' summary judgment motions, but the testimony did not support her claims. Mrs. Banfield also provided her own affidavit as support for her claims. However, her affidavit is not entitled to evidentiary weight because it contained mere conclusory restatements of the allegations in her complaint. Mrs. Banfield offered nothing more that her allegations to support her claims, which

is insufficient to meet her burden of producing evidence to oppose a summary judgment motion supported by evidentiary materials. See Fed. R. Civ. P. 56(e)(opposing party must respond to properly supported affidavit with "specific facts showing that there is a genuine issue for trial.").

Although Turner admitted he was a fiduciary, the district court granted him summary judgment because his actions were not arbitrary or capricious. A fiduciary's decisions will be upheld under ERISA unless they are arbitrary or capricious. Cutting v. Jerome Foods, Inc., 993 F.2d 1293, 1295-96 (7th Cir.), cert. denied, 114 S.Ct. 308 (1993); Pokratz v. Jones Dairy Farm, 771 F.2d

206, 208-09 (7th Cir. 1985). Fiduciaries are entitled to this level of deference only if the plan expressly provides them with discretionary authority. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989) (fiduciary's decisions reviewed de novo unless plan gives discretion, in which case fiduciary's decisions are reviewed under more deferential standard); McDaniel v. Blue Cross & Blue Shield of Alabama, 780 F.Supp. 1363, 1364-65 (S.D.Ala), aff'd without op., 977 F.2d 599 (11th Cir. 1992). The record does not indicate whether the AAELO plans gave Turner such discretionary authority, but neither party has disputed that such authority exists in this case. Mrs. Banfield has

not put forward any evidence to create a genuine issue of material fact about whether any of Turner's decisions were arbitrary or capricious. Moreover, Mrs. Banfield has not even put forward any evidence of a fraud, misappropriation, or breach of contract by another fiduciary that Turner knowingly failed to stop. On this record, Mrs. Banfield simply has not carried her burden of coming forward with evidence sufficient to create a genuine issue of material fact, and thus summary judgment was correctly entered against her.

The district court's finding that no misappropriation occurred also requires dismissal of Mrs. Banfield's breach of independence claim that was base on the

purchase of the annuity for Turner. Since no misappropriation occurred, the purchase of the annuity was not a breach because it did not cause Turner to receive more than the amount to which he was entitled. Gallagher testified at deposition that the annuity was included in the calculation of Turner's benefits, and Mrs. Banfield provided no evidence to refute this testimony.

II

Mrs. Banfield also argues that the district court erred by not granting an oral hearing on the motions for summary judgment. Mrs. Banfield states that the district court's failure to hold an oral hearing somehow prejudiced her, but fails to explain how she was prejudiced. Rule

56 does not require an oral hearing on a motion for summary judgment. Hamman v. Southwestern Gas Pipeline, Inc., 721 F.2d 140, 142 (5th Cir. 1983); Chrysler Credit Corp. v. Cathey, 977 F.2d 447, 449 (8th Cir. 1992) (parties' right to be heard on summary judgment motion is satisfied by the opportunity to submit briefs and supporting affidavits). Moreover, even when summary judgment is improperly entered against a party, that party must demonstrate prejudice in order to obtain relief on appeal. See Yashon v. Gregory, 737 F.2d 547, 522 (6th Cir. 1984). Mrs. Banfield has not shown prejudice from the district court's failure to hold an oral hearing.

Finally, Mrs. Banfield argues that

the district court erred by "requiring the Appellant to respond to the Motion for Summary Judgment when the Appellee's [sic] had failed to complete discovery." Brief of the Appellant at Table of Contents. Mrs. Banfield's brief states that the missing discovery consists of "checking accounts of the pension plans and the tax returns of Dr. Turner." Brief of the Appellant at 38. However, Mrs. Banfield apparently received the disputed bank statements, which were attached to her Rule 60(b) motion. Mrs. Banfield did not state in that motion that the bank statements were newly discovered evidence. Mrs. Banfield had more than nine months to respond to the summary judgment motions and to press for

discovery. The record is devoid of any indication that she pressed for production of these documents after November 1993, more than three months before her summary judgment response was due. Because Mrs. Banfield did not press these claims, the district court and parties had no way of knowing that she believed discovery was incomplete. The district court did not abuse its discretion by requiring Mrs. Banfield to respond to the summary judgment motions more than nine months after the first one was filed, particularly since Mrs. Banfield did not bring any outstanding discovery to the court's attention.

III.

Mrs. Banfield appealed from the

district court's denial of her Rule 60(b) motion. The district court's judgment should be affirmed. The district court's denial of a Rule 60(b) motion is reviewed for abuse of discretion. United States v. Grable, 25 F.3d 298, 302 (6th Cir. 1994).

Mrs. Banfield filed her Rule 60(b) motion on the same day she filed her notice of appeal from the district court's order granting summary judgment to the defendants. A timely notice of appeal divest the district court of jurisdiction, with limited exceptions. Pittock v. Otis Elevator Co., 8 F.3d 325, 327 (6th Cir. 1993). Under Fed. R. App. P. 4(a)(4), a Rule 60(b) motion, if served within 10 days of the entry of

judgment, would toll the time for appeal, the notice of appeal would be ineffective until the Rule 60(b) motion was resolved, and the district court would retain jurisdiction to rule on the Rule 60(b) motion. Here, however, Mrs. Banfield did not serve her Rule 60(b) motion within the 10-day period. Therefore, the time for appeal was not tolled, the notice of appeal was timely and was effective when filed, and the district court was divested of jurisdiction to rule on the Rule 60(b) motion. Grable, 25 F.3d at 301 n.3 (Rule 60(b) motion not served within 10 days of judgment did not toll time for appeal).

Mrs. Banfield argues that her notice of appeal was filed only as a protective

measure because the district court had not ruled on her pending motion for extension of time to appeal. After both the Rule 60(b) motion and the notice of appeal were filed, the district court granted Mrs. Banfield's motion for extension of time to appeal. Mrs. Banfield asserts that the notice of appeal should have been held in abeyance to allow the district court to rule on the Rule 60(b) motion, even though Mrs. Banfield never moved to withdraw or dismiss her notice of appeal after the extension was granted. Mrs. Banfield's argument is meritless. Courts cannot be required to read parties' minds. When a party has filed a notice of appeal and takes no steps to dismiss the appeal,

courts must be able to assume that the party meant to file the appeal and live with its attendant consequences.

The district court's denial of Mrs. Banfield's Rule 60(b) motion was correct and thus was not an abuse of discretion.

For the reasons stated above, the district court's orders are AFFIRMED.

APPENDIX B

OTHER OPINIONS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MEMORANDUM AND ORDER

This action arises under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. Section 1001 et seq. The Plaintiff, the Estate of Harlow F. Banfield, is the successor in interest to the rights or benefits of Harlow F. Banfield, an employee of and a plan participant under an employee pension benefit plan known as the Anesthesiology Association of East Liverpool, Ohio (AAELO). Plaintiff Darlene Banfield is

Harlow Banfield's beneficiary under this Plan. The Plaintiffs allege that Defendant Kenneth Turner was a fiduciary of the AAELO Plan because he acted as or controlled the administration and the plan sponsor. The Defendants Peter Visnic and William Miller, partners in Defendant Crable, Miller and Visnic, were the certified public accountants for AAELO. They prepared tax returns, reviewed, aided or assisted in preparation or distribution of all information regarding the Plan including financial statements, participant disclosure statements and actuarial statements. Defendants Francis Gallagher and the Thompson Plan Administration Company acted as actuaries and solicited,

sold or acted as agents for the sale of an annuity to the Plan.

The first cause of action constitutes claims for breach of contract, fraud and breach of fiduciary duty. Plaintiffs allege in the second cause of action that an annuity was purchased for Defendant Turner though the Plan. This purchase involved a known breach of independence to the Plan. Finally, in the third cause of action, Plaintiffs allege that after the death of Banfield, Defendants Turner, Visnic, Miller and Crable, Miller and Visnic conspired to mislead, misrepresent and conducted a fraud upon Banfield's beneficiaries and breached their fiduciary duties. This matter is before

the Court upon the motions for summary judgment filed by all Defendants.

Defendants William Miller, Peter Visnic, Crable, Miller and Visnic, Frances Gallagher and Thompson Plan Administration argue that they are not fiduciaries of the Plan and cannot be liable under ERISA. 29 U.S.C. Section 1132a(1)(B) allows a civil action to be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce rights under the terms of the plan or to clarify rights to future benefits. Liability for breach of fiduciary duty is found in 29 U.S.C. Section 1109. Also, 29 U.S.C. Section 1132(1) provides that the Secretary shall assess a civil penalty

against a fiduciary or any knowing participation in such breach by any other person. There does no appear to be any provision allowing a private cause of action against a person violating ERISA who is not a fiduciary.

The United States Supreme Court has recently held that 29 U.S.C. Section 1132(a)(3) allowing plan participants to bring civil actions to obtain appropriate relief does not authorize suits against non-fiduciaries who knowingly participate in a fiduciary's breach of duty. Mertens v. Hewitt Associates, ___ U.S. ___, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993). ERISA allows equitable relief whereas the petitioners were requesting compensatory damages. Id. 113 S.Ct. at 2068. By not

providing for damages against non-fiduciaries, ERISA has eliminated the common law's joint and several liability for direct and consequential damages suffered by the Plan caused by persons who had no real power to control what the Plan did. Id. at 2072.

29 U.S.C. Section 1001(21)(A)provides in pertinent part:

A person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or

indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

The affidavits of Peter Visnic and William Miller establish that neither they nor the firm of Crable, Miller and Visnic had any discretionary authority or control respecting management or disposition of the plan's assets, nor did they render investment advice for a fee or other compensation or had any authority to do so and neither had any discretionary authority or responsibility in the administration of the Plan. William Miller filled out a form called a

Census Form that was sent to him by the plan administrator and he prepared the amortization schedules for the notes due the pension plan by Dr. Turner. He also prepared the general ledger, financial statements, corporate federal income tax return, annual franchise tax return for Ohio, the personal property tax return for the county and the city income tax return for the corporation. Peter Visnic states that he prepared the personal income tax returns for Dr. and Mrs Banfield. This conduct does not fit ERISA's definition of fiduciary.

Francis Gallagher's affidavit shows that neither he nor Thompson Plan Administration Company performed any conduct set forth in ERISA's definition

of fiduciary. However, Gallagher's deposition demonstrates that the plan administration may have exercised control respecting management or disposition of its assets. Thus, whether or not he and the Company were fiduciaries is an issue for trial.

Plaintiff has not presented any evidence controverting Gallagher and Thompson Plan Administration's assertion that they did not direct, act or conspire with regard to the acts complained of in the complaint. In accordance with the discussion below concerning Kenneth Turner, there is no indication of a misappropriation of Dr. Banfield's funds.

Kenneth Turner admits that he was a fiduciary of the Plan but contends that

he acted legally, appropriately and fairly with regard to the administration of the Plan and distribution of the Plan benefits. It has been held that a plan's denial of benefits may not be disturbed unless the action was arbitrary or capricious. Pokratz v. Jones Dairy Farm, 772 F.2d 206, 208 (7th Cir. 1985). A fiduciary or plan administrator's decision is to be upheld unless the plaintiff proves that the decision was unreasonable based on the facts. McDaniel v. Blue Cross Blue Shield of Alabama, 780 F.Supp. 1363, 1365 (SD Ala 1992); aff, 977 F.2d 599 (11th Cir. 1992).

Review of the record demonstrates that there is no indication of

misappropriation of Dr. Banfield's funds or contributions made to the AAELO Pension Plan. The actuary firm retained by Mrs. Banfield to conduct an evaluation of the distributable benefits from the Plan reported that Dr. Banfield made approximately sixty to sixty-five percent of the contributions and received the same percentage of benefits.

Virginia Bennett, secretary and bookkeeper of AAELO testified that Dr. Banfield and Dr. Turner co-signed all checks issued by the Plan. Neither could remove funds without the others knowledge. She stated that Dr. Banfield and Dr. Turner had an amicable relationship and trusted one another. Throughout her 14 years employment with

AAELO she saw no evidence of fraudulent or inappropriate conduct by Dr. Turner.

A financial consultant reviewed Dr. Banfield's estate and financial files and was unable to find any evidence of fraud with regard to the administration of the Pension Plan.

Accordingly, the motions for summary judgment are granted.

IT IS SO ORDERED.

George W. White
UNITED STATES
DISTRICT JUDGE
5-12-94

APPENDIX C

ORDER DENYING REHEARING

Reprinted below is the Order of the United States Court of Appeals For The Sixth Circuit Court in the appeal Darlene Banfield v. Kenneth W. Turner et al., Record No. 94-3663, 94-3864 filed October 12, 1995, on the appellants' Petition for Rehearing with Suggestion for Rehearing In Banc.

Before: RYAN, BATCHELDER and MOORE, Circuit Judges

Upon consideration of the petition for rehearing filed by the defendant, which was one (1) day late but is, nonetheless, accepted for filing,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

For the Court,
/s/ Leonard Green

CLERK

Dated: Oct 12, 1995

APPENDIX D

Text of Cited Authorities

The limitation on contribution to a pension plan is found in I.R.C. Section 401 (a) and (c) Requirements for Qualification :

" A trust ... forming a part of a ... pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section ... (c) of contributions are made to the trust by such employer, or employees, or both ..." (emphasis ours).

I.R.C. Section 401 et seq.:

"[I.R.C.] Regulations Sect.1.401-0 Scope and Definitions. - (b) Definitions. For purposes of the post-ERISA regulations -

(1) Qualified Plan. The term "qualified plan" means a plan which satisfies the requirements of I.R.C. Section 401(a).

[I.R.C.] Regulations Sect. 1.401-1

Qualified pension ... plans:

(a) Introduction -"(1) [I.R.C.] Sections 401 through 405 relate to pension. . . plans. [I.R.C.] Sect. 401(a) prescribes the requirements which must be met for qualification of a trust forming part of a pension, . . plan."

(2) A qualified pension . . . is a defined written program (emphasis ours) and arrangement which is communicated to the employees and which is established and maintained by an employer. (emphasis ours)

(3) In order for a trust forming part of a pension . . . plan to constitute a qualified trust under [I.R.C.] Section 401(a), the following tests must be met:

(ii) It must be apart of pension plan established by an employer (emphasis ours) for the exclusive benefit of his employees....

(v) It must be part of a plan which benefits prescribed percentages of the employees...(non-discriminatory)

(vi) It must be a part of a plan under which contributions or benefits do not discriminate in favor of certain specified classes of employees (see [I.R.C.] Section 1.401-4)

(b) General Rules. - (1)(i). . . Retirement benefits generally are measured by ... , such factors as years of service and compensation received by the employees.(emphasis ours)

. . .(3). . . A plan is not for the exclusive benefit of employees ... if, by any devise whatever, it discriminates either in eligibility requirements, contributions, or benefits in favor of employees who are officers, shareholders, ..., or highly compensated employees. . . All the surrounding and attendant circumstances and the details of the plan will be indicative of whether it is a bona fide. . . pension . . . plan.

(5)(ii) Where trust funds are . . . loaned to, .. other persons described in [I.R.C.] Section 503(b), full disclosure must be made of the reasons for such arrangements and the conditions under which such investments (emphasis ours) are made in order that a determination [by the I.R.S.] may be made whether the trust serves any purpose other than constituting part of a plan for the exclusive benefit of employees." (emphasis ours)

APPENDIX E

Other Materials

Section E (i)

DEFENDANT KENNETH W. TURNER'S SEPARATE ANSWER TO COMPLAINT OF PLAINTIFF DARLENE BANFIELD:

PAGE 029, PARAGRAPH 16

The Anesthesiology Assoc. of East Liverpool, Ohio, Inc. received monies from Harlow F. Banfield referred to as "Private Practice Income"; however, the Defendant is without information or knowledge sufficient to form a belief as to the dates and amounts of payment, and therefore, denies the same.

PAGE 029, PARAGRAPH 17

The Defendant admits the private practice income transfered and assigned by Harlow F. Banfield to Anesthesiology Assoc. of East Liverpool, Ohio, Inc. was not from the profits of AAELO.

Section E (ii)

Now comes Plaintiff by and through counsel and moves this court for Defendants collectively to produce discovery which was requested on May 18, 1993 and to date has not been provided and for good cause states that this case involving a pension, its funding and distribution therefrom, centers around financial data, particularly the pension checking and savings accounts. The Plaintiff requested discovery of these accounts on May 18, 1993 and to date they have not been received. These accounts

are critical in the proof of Plaintiff's claim as to who funded the pension and Plaintiff's inability to obtain this discovery greatly prejudices Plaintiff in the preparation for and the presentation to the early neutral evaluator.

Now comes Plaintiff by and through their counsel and move this Court for an order to extend time to file her brief in opposition to Motion for Summary Judgment until 14 days after the Defendants give Notice to the Court of filing additional discovery.

Heretofore the Plaintiff requested Defendants to produce certain discovery including but not limited to two (2) pension bank accounts involving

Anesthesiology Association of east Liverpool, Inc. Integrated Pension fund Acct. No. 4-46246 (First National Bank of East Liverpool, Ohio n.k.a Bank One Acct. No. 000446246) and Anesthesiology Association of East Liverpool, Ohio Inc. Pension Trust Acct. No. 4-46254 n.k.a Bank One Acct. No. 000446254.

The Defendants did produce documents from 8/31/78 to 1/22/88 with a 1/22/88 balance of $7,187.65 for the Pension Trust and 9/22/78 to 1/23/90 with a 1/23/90 balance of $2,975.00 for the Integrated Pension Fund.

Information available indicates that the Pension Trust was in existence long after the date for which the discovery

was produced. Attached is the front page of a Form 5500-C/R for the Pension Plan indicating the existence of the Bank One Checking Acct. # 000446254 with a balance of $37,725.62. See Exhibit A.

Information available also indicates that the Pension Plan and/or Integrated Plan was in existence during the calendar year 1991 in which no information has been provided, and Plaintiff believes that the Integrated Pension Fund was in existence in 1991. See Exhibit B.

The discovery not provided from the period of 1/22/88 to final distribution to the issue of whether distributions from the plan were correct. In order to properly respond to the Summary Judgment motion, the obtainment of this

information is compulsory.

Therefore, the Plaintiff respectfully requests this Court to extend the time to respond to the Motion for Summary Judgment until 14 days after the previously requested discovery has been completed.

Section E (iii) Excerpts from Moskal, Jaras Report

BASIC ISSUES

ARE THE DISTRIBUTION CALCULATIONS FOR DR. BANFIELD CORRECT?

ACCORDING TO MRS. BANFIELD, DR. BANFIELD ALSO HAD ANOTHER PRACTICE (sole proprietorship) WITH INCOME BEING TRANSFERRED TO THE CORPORATION FOR THE PURPOSE OF BEING INVESTED IN THE PENSION PLANS. WHAT HAPPENED TO THIS MONEY (approx. $272,000)?

DR. KENNETH W. TURNER (Dr. Banfield's partner) HAS DISTRIBUTIONS DUE FROM THE

PLANS. ARE THESE CALCULATIONS CORRECT?

THERE WERE EMPLOYEES OF THE CORPORATION WHO WERE ALSO PARTICIPATING IN THE PLANS. THEIR DISTRIBUTIONS WERE MADE IN 1988, 1989, and 1990. WERE THE CALCULATIONS CORRECT?

HISTORY OF CONTRIBUTIONS

DATE		H. F. BANFIELD PRIVATE PRACTICE INCOME
06/30/78	INTEGRATED PENSION TOTAL	(not included in contribution)
06/30/79	INTEGRATED PENSION TOTAL	$ 31,746
06/30/80	INTEGRATED PENSION TOTAL	38,182
06/30/81	INTEGRATED PENSION TOTAL	48,645

06/30/82	INTEGRATED PENSION TOTAL	50,315
06/30/83	INTEGRATED PENSION TOTAL	49,247
06/30/84	INTEGRATED PENSION TOTAL	33,900
06/30/85	INTEGRATED PENSION TOTAL	20,349
06/30/86	INTEGRATED PENSION TOTAL	
06/30/87	INTEGRATED PENSION TOTAL	
	TOTAL	$ 272,384

Banfield Private Practice Income	Banfield	Turner	Total
$272,384	$533,338	$327,677	861,015
	62%	38%	100%

[Petitioner's Note that the private practice income is not included in the computation of the allacative actuarial totals

Loss Allocation

	Total	Re-Allocation Due to Asset INsufficiency
Mrs Banfield	1,114,627	($7,688)
Dr. K.W. Turner	369,474	($4,293)

[Petitioners Note--Loss only allocated to the above participants and to no other beneficiaries]

RESULTS OF EVALUATION

DR. BANFIELD DID CONTRIBUTE APPROXIMATELY 60-65% OF THE PLAN CONTRIBUTIONS AND ALSO RECEIVED APPROXIMATELY 60-65% OF THE

BENEFITS. THEREFORE, THE PRIVATE PRACTICE INCOME DID FLOW THROUGH TO THE PENSION PLANS.

ACCORDING TO OUR CALCULATIONS, THE REMAINING DISTRIBUTIONS TO BE MADE @ 12/31/90 ARE:

MRS. D. BANFIELD

Integrated	Pension	(1) Less: RE-ALLOCATION DUE TO ASSET INSUFFICIENCY
$ 435,687	$ 678,940	$ (7,688)
TOTAL DUE		$ 1,106,93

DR. K.W. TURNER

Integrated	Pension	Less: RE-ALLOCATION DUE TO ASSET INSUFFICIENCY

$358,893	$ 10,581	$ (74,293)
	TOTAL DUE	$365,18

Section E (iv)

DEPOSITION OF MARVIN H. FELDMAN

Page 25

15 Q. Who suggested Moskal Jerris?

16 A. I did.

Page 46

2 Q. And was it then your suggestion that in fact none of the

3 $250,000 should have been put in?

4 A. If Fred had come to me and said what should I do, I

5 probably would have said buy a

Keogh for just yourself, don't put any more money in the corporate side.

Q. Doesn't a Keogh have limitation?

A. A Keogh has a limitation, depending upon earnings, yes. Well, there are two different types of Keoghs, though. There is a defined benefit pension Keogh, and then there's a regular Keogh, which is thirty thousand a year max.

Q. So that what you're saying is your advise would have been different than that of what the Thompson Plan is advising?

A. That's correct.

Q. And in the report of Moskal Jerris, did they say that the contribution made then was done improperly?

A. They were not asked to make a determination as to whether it was proper or improper. They were asked to make a determination as to the allocation of funds.

Q. I know. You've said that it was pursuant to the trust document.

A. Right.

Section E (v)

COMPENSATION SYSTEMS, INC.
OF AMERICA

Pension Administrators and Actuaries

26250 Euclid Avenue, Suite 531,
Euclid, Ohio 44132-3602
(216) 731-7701

Feb. 8, 1994

William Paul McGurie, Esq.
MCGUIRE AND FORD CO., L.P.A.

Bank One Bldg.
106 East Market Street, Suite 705
Warren, Ohio 44482

Re: Banfield vs. Turner

Dear Mr. McGuire:

One of the main issues which we are investigating is the source of funding for both the Pension and the Integrated Plans.

Dr. Banfield reached Normal Retirement Age during 1984, therefore no contributions on his behalf were made after that year. All of the contributions which were made out of the private practice into the Pension Plans had to have been made prior to his reaching NRA in 1984.

The **Plan** checkbooks do not indicate the source of the deposits, therefore the **source** records are required to determine which accounts the deposits came from. The only deposit which can be traced to the private practice in the records we have was for $20,000. and it was made in 1984. In order to determine the source of the contributions made to the Plans, we must review the actual checkbooks of the possible sources. At this time we are still missing the following necessary records:

Private Practice of Dr. Banfield:

Checkbook for 1978-1983 (the book we have begins in April, 1983)

AAEL Corp.:

Checkbook for 1978-1983
Savings Acct. for 1978-1984

Exhibit A
Page 1 of 2
Page 2

We will not be able to meet the proposed due date of March 1 without the above records.

Please forward them to our office a your earliest convenience.

Sincerely,

Comensation Systems, Inc. of America

By:_____
Martin A. Jaras, CPA

Section E (vi)
Excerpted from Tax Sheltered Plan Proposal for Anestesiology Associates of E. Liverpool, Ohio P.C. by B.J. Thompson & Associates, Inc. Dated June, 1978

HARLOW F. BANFIELD

ANALYSIS OF VOLUNTARY CONTRIBUTION

ESTIMATED INCOME - $100,000

TAX BRACKET - 62%

RETIREMENT PLAN ENTRY AGE - 63

MAXIMUM VOLUNTARY CONTRIBUTION - 10% OF Salary

ALTERNATIVE
INVESTMENT

	METHODS	
	Personal	Voluntary Contribution
AVAILABLE INVESTMENT:	$10,000	$10,000
INVESTMENT RESULTS:		
Gross Earnings On Investments	8%	8%
Less: Income Tax Payable	5%	-0-
Earnings Remaining After Taxes	3%	8%

	ALTERNATIVE INVESTMENT METHODS	
	Personal	Voluntary Contribution
Accumulation Results:		
7 Year Total (after taxes)	$76,624	$83,652
Difference:		

$ 7,028

NOTE: PLAN ADMINISTRATOR WAS AWARE OF METHODS WHICH WOULD EARMARK BENEFIT TO DR. BANFIELD.

KENNETH W. TURNER

ANALYSIS OF VOLUNTARY CONTRIBUTION

ESTIMATED INCOME - $72,000

TAX BRACKET - 55%

RETIREMENT PLAN ENTRY AGE - 55

MAXIMUM VOLUNTARY CONTRIBUTION - 10% OF SALARY

	ALTERNATIVE INVESTMENT METHODS	
	Personal	Voluntary Contribution
AVAILABLE INVESTMENT:	$7,200	$7,200
INVESTMENT RESULTS:		
Gross Earnings On Investments	8%	8%
Less: Income Tax Payable	4.4%	-0-

	ALTERNATIVE INVESTMENT METHODS	
	Personal	Voluntary Contribution
Earnings Remaining After Taxes	3.6%	8%
Accumulation Results:		

7 Year Total (after taxes)	$84,956	$93,320
Difference:		
	$ 8,364	

RECOMMENDATION:

Have salary from partnership run through corporation to increase wages and deposit:

PARTNERSHIP SALARY	$40,000
CORPORATE INCOME	$80,000
TOTAL INCOME	$120,000

[Petitioners's Note -- The assignment of income was contemplated at the very first proposal of the plan]

Section E (vii)

Excerted from Dr. Banfield's 1976

Form 1040

Form 1040

Income other than Wages, Dividends and Interest.

29 Business income 76,843.51

32a Pensions, annuities, rents, royalties, partnerships, estates or trusts, etc. 20,776.95

Section E (viii)

DEPOSITION OF WILLIAM MILLER

Page 11

Lines 6-11

Q. Were you a participant in any meeting that occurred between Dr. Banfield and Dr. Turner and Mr. Gallagher with regard to --

A. The initial meeting they had, I was there.

Q. And when was that initial

meeting?

A. I would say it would be in 1977 sometime.

DEPOSITION OF WILLIAM MILLER

Page 12

Lines 23-25

A. He was a partner in a practice with his brother, and, I believe, his brother's son-in-law, which is Banfield, Banfield & Amato.

Page 13

Lines 12-19

Q. Were you aware that as a part of the discussion prior to the inception of the plan that they were discussing to take Dr. Banfield's income, private practice income, and put it into the AAELO corporation checking account and then transfer that fund to AAELO's pension account?

A. My understanding was Dr. Banfield would assign his private practice income to the corporation, AAELO;

Page 14

Lines 7-10

Q. At any time in the past, have you ever classified the transfer of funds from Dr. Banfield's private practice to the corporation as a gift?

A. No.

Page 15

Lines 1-7

Q. Were you aware that the 5500s for these plans were being prepared by Thompson Plan --

A. Yes, I was.

Q. -- or its successor in interest, B. J. Thompson & Associates, Inc.?

A Thompson Plan

Administration was preparing
the 5500s.

Page 16

Lines 24-25

Q. Okay. Prior to 1977, did you report Dr. Banfield's private practice income on his 1040?

Page 17

Lines 1-10

A. Prior to the assignment of the income to the corporation, the private practice income would have been reported on his 1040, yes.

Q. And after the assignment

of income, did
you report that income on his
1040?
A. Not on his 1040, no.
Q And for how long did that
occur; until Dr.
Banfield passed away?
A. No. He withdrew his
assignment, I
believe, in '85 sometime; and I
think his private practice
income remained -- did not go to
the corporation.

Page 19

Lines 3-22

Q. Okay. Irregardless of
what date they

actually moved into that building, did they maintain separate physical offices in that building?

A. Yes, they did.

Q. When you walked through the door, if you went to the left, you would go to a room marked AAELO?

A. That's correct.

Q And if you walked to the right, you go into another room that was marked Dr. Banfield?

A. That's correct.

Q. What type of practice did Dr. Banfield perform in his private practice?

A. General practice.

Q. Did he perform pediatrics?

A. Yes.

Q. How about AAELO?

A. Anesthesiology administration.

Q. Were there any doors that connected those two offices other than the two entrance doors?

A. Not that I -- no.

Page 21

Lines 13-19

Q. Does that document reflect how much private practice money was transferred to AAELO?

A. No, it does not.

Q. In what way is it in error?

A. In what way what?

Q. In what way does it not describe it?

A. I'm sorry. It does, yes.

Page 24

Line 21

Q. Were you present at a meeting between

Page 25

Line 1

A. Was that the one in my office?

Page 27

Lines 10-14

A. At the time he assigned the income to the corporation, it was not reported on his 1040.

Q. And he did not pay tax on that income on a 1040 basis?

A. That's correct.

Page 33

Lines 15-25

Q. In the initial discussion with regard to the establishment of these pension plans, were you privy to any discussion as to whether AAELO

Corporation would have a
18 cash flow problem meeting its
obligations if the pension
19 plans were put in place?
20 A. Well, if the two pension
plans were put in
21 place and Dr. Banfield had not
designated his income to the
22 corporation, there would have been
-- and drew the same
23 amount of salary out, there would
have been no way the
24 corporation could have funded the
pension as it was funded.
25 Q. So the only way to fund
these pension

Page 34

Lines 1-5

plans was to transfer the money from Dr. Banfield to the corporation?

A. That was the idea of the second pension plan was to give him availability of another plan to shelter his private practice.

Section E (ix)

PLAINTIFFS MEMORANDUM IN OPPOSITION
TO MOTIONS FOR SUMMARY JUDGMENT

ORAL HEARING REQUESTED

Now comes Plaintiff by and through her counsel and submits the memorandum in opposition to Motion for Summary Judgment and states that for purposes of efficiency it will file one brief in response to all motions for Summary Judgment as the motions of Defendants Miller, Visnic, Crable, and Miller, and Thompson are substantive issues and the

motion of Turner is interrelated to the discussion in response to Defendant Miller and Thompsons's.

The gist of the motions of Defendant's Miller; Crable; Crable, Visnic & Miller and Thompson asset that (1) they are not fiduciaries under ERISA and therefore are not proper parties before this Court and (2) the cause as asserted by Plaintiff are state causes of action which ERISA does not pre-empt.

FACTS

Mr. Gallagher graduated from Cleveland State University Law School in 1975 (Tr P7, L2); practicing lawyer (TR. P7, L11, L23); former IRS agent reviewing pension and profit sharing plan (TR. P13, L12-16); student federal income tax

course in law school (TR. P23, L14) and attended extensive seminars in the field of pensions (TR. P24, L6-24); offering legal advise with regard to pension plans (TR. P8, L7-16) work with both plan administration company as president and insurance sales company (TR. P8, L7-9)

Thompson Plan Administration Company does full service pension work. It designs, implements, administers and terminates plan (TR., P11, L9-12) calculating contributions, accounting balances, filling out 5500 Forms (TR. P11, L7-11) person's business who's involved in the formulation of the plan rely upon Thompson Plan Administrator expertise as a plan administrator and manager and as an attorney (TR., P12, L5-

9)

At the time of plan inception B.J. Thompson acted as both insurance sales and qualified plan administrator (TR. P14, L4-6)

The plan in question structured by B.J. Thompson Plan Administrators (TR., P16, L5) The plan administrator performed the services described in the invoices (EXHIBIT 4 and Tr. P20, L6-19) submitted to the plan.

The plan was structured with the knowledge that the employer had insufficient funds to meet its pension cost obligation (TR. P22, L25 - P23, L13)

The client gives the plan their goals and plan administrator create a plan that meets the goals (TR., P20, L22,

P21, L2). Knowing that the establishment of the plan would create a cash flow problem, the plan wa designed to transfer funds from a separate taxable entity (not the plans sponsor) to the plan (TR. p25 L7-P26, L7) (See Plaintiff's Exhibit 1 Page 7)

The Defendant Thompson could not support his preposition that Dr. Banfield was a leased employee of AAELO to Dr. Banfield's private practice (TR. P31, L4-10) (TR. P31 L15 to P32 L8). The Defendant Thompson prepared the proposal (Plaintiff's exhibit 1) and completed the documents necessary to establish the plan (TR. P31 L12-15) Provided Summary Plan Description (TR. P32 L22) [sic real estate plan descriptions]; benefit

statements for each plan year (TR P33, L3-4).

Further, the Defendant Thompson acknowledges that the plans are established for the benefit of the participants of the plan (TR. P33, L8-25) and Defendant Thompson was paid for the establishment of the plan (TR. P36, L19-21) and made later changes for the plan year (TR. P33, L3-4).

The Defendant Thompson indicated that the amount of funds transferred was provided by Defendant Miller (TR P34, L10) Further the purpose to transfer the funds from Dr. Banfield's private practice was to shelter that income from Federal Income Tax (TR. P39, L18, - P40, L3)

Defendant Thompson acknowledge that he calculated the amount of the plan benefit (TR P43, L6, - P44, L10) and that he denied the fact that the plan was underfunded and Mrs. Banfield did not reduce her plan benefit by an alleged $25,000 of underfunding.

Defendant Thompson stated that its company "administrators (the) qualified plans for AAELO" TR. P44 L15 but was not the "plan administrators TR. P44, L25.

Defendant Thompson Plan admits that duties were delegated to Thompson Plan (TR. P45, L9) including the preparation of Form 5500 where loans to participants (i.e. Dr. Turner) were not disclosed. (TR. P46 L1-12)

Defendant Thompson Plan admits that

a company that it shares space with B.J. Thompson sold an annuity to the plan (TR. P46, L18-19) and that clients of both the Thompson Plan Administrators and B.J. Thompson and associates (TR. P50, L8-9) and that upon sales of insurance products by B.J. Thompson and Executive Life Annuity and a life policy on Dr. Banfield (TR. P53, L15) and obtained a commission on the sale of that product (TR P54, L1-4).

Defendant Thompson Plan admits that despite the assertion that the private practice income being for the sole benefit of Dr. Banfield, that Dr. Turner since the plan was a defined benefit plan, that plan contributions benefit all the beneficiaries of the plan (TR. P55,

L4 to 25); (TR. P56 L1-4); (TR P65 L23-25) that no separate accounts were established for a participant (TR. P62, L16-18) and Dr. Banfield made no separate vso contributions (TR. P64, L8-12) and such vso contributions would have been separatley segregated (TR. P64 L13-25). Defendant Thompson admits that Mr. Miller was aware that Dr. Banfield's private practice income would be transferred to the plan (TR P58 L4-8).

Defendant Thompson admits that without Dr. Banfield's private practice income the plan benefits would have been reduced for the plan participants (TR P66, L1-7)

Defendant Thompson admits that the figures for salary, bonus and plan

contributions were provided by Bill Miller and the contribution amounts were computed by Defendant Thompson (TR.P66, L16-25) and Dr. Turner did not make the determination of contribution (TR. P67, L18-25) Thompson plan made the determinatin for plan benefits (TR. P69, L2-9).

Defendant Thompson stated that AAELO would not have the financial resources to fund the plan and maintain the same levels of compensation to Dr. Turner and Dr. Banfield, and fully fund the plans (TR P75, L12-19) and that Dr. Banfields and Dr. Turners compensation was not substantially different prior to the instructions of the plans (TR P77, L11-15)

Further Defendant Thompson stated that if an error was made in the payment of a plan participant that the plan administrator would have the ability to seek restitution from the plan participant who is overpaid (TR. P88, L1-6)

Banfield Private Practice Employees:

Roberta Helfrich	TR P5 L7
Darlene Banfield	TR P5 L17-18
Marcia Welsh	TR P6 L8-10

Employees of AAELO

Rosie Gabbert	TR P8 L3
Margaret Misconish	TR P13 L24
Margaret Alberti	TR P14 L17
Ann Smith	TR P15 L1
Mary Smurthwaite	TR P15 L18

Betty Barnhart TR P15 L25

Received check form Dr. Banfield to be deposited in AAELO (TR P8 L12-14 and TR P9 L18-24) and which it was turned over to the pension fund (TR P9, L1-3)

Private practice employees did not receive a W-2 from AAELO (TR. P12, L16-17)

Virginia Bennet in her deposition stated tht she was instructed to write checks off the pension account by Bill Miller (TR. P18, L3-11) or Mr. Thompson (TR P62 L15-19) and that Mr. Miller handled the pension loan paybacks (TR. P74, L14-17) and that the doctors did not have a working knowledge of the plan when asked questions and required Defendant Thompson to explain the plan (TR. P29,

L14-18). Her opinion was that Dr. Turner did not know anything about the plan (TR. P34, L2-3).

Dr. Turner never provided similar checks to place in pension fund as Dr. Banfield did (TR. P73, L21-24). A natural question of fact arises sice Mrs. Bennett's testimony indicates loan repayments were for corporated loan repayments not pension loan repayments (TR. P76, L1-25 and TR. P77 L1-2) and that no pension loan repayment were ever made.

Denise (Darlene Banfield's sister TR P6 L7

Roberta Helfrich TR P5 L22
(Gabbert 8 yrs. left 1983 TR P37 L7)

Dr. Turner never deposited check into

AAELO (TR P12 L15-16) Repayments for Corporate Loans (TR P14 L12-20 and P15 L1-14) Salary checks of Dr. Turner and Banfield in like amounts - (TR P14 L22-24)

Confirmed that Mr. Miller was familiar with the separate offices of AAELO and Dr. Banfield (TR P19 L17 and TR P23 L22) the offices were totally separate.

Pediatric practice was part-time (TR P24 L15-19), private practice separately listed in phone book (TR P25 L15-18).

Private practice not in AAELO portion of the building (TR P27 L12-20). Private practice had separate staff (TR P36 L4-8)

Checks deposited to AAELO after they

were redeposited were taken care of by Mr. Miller (TR P43 L13-15).

At Deposition (TR P45 L14-21) Rose Gabbert that Dr. Banfield had a private practice during the period of time her worked for AAELO (TR P48 L10-13), that the intent was to help his family because Dr. Banfield knew that he would not live long (TR P55 L21-22).

In pertinent part Defendant Miller's Testimony is summarized as follows:

Defendant Miller testified that Defendant Thompson plan did the administrative work for the plans [TR. P10 L16-17]

Defendant Miller was the secretary of AAELO in 1989 upon dissolution of the corporation [TR. P11 L16]

Defendant Miller confirms that prior to the establishment of the plans that he and Defendant Thompson knew that private practice income would be diverted to the plans [TR P12 L5 - P13 L 22]. However Defendant Miller classifies the diversion as an assignment of income in 9 different times in his testimony [TR P13 L19]; [TR P17 LI, L4, L9] [TR P26 Lines 3,4,6,9] [TR P27 LIO] Twice Defendant Miller denied that he ever attempted to explain the diversion of the income as a gift. [TR P147-10] [TR P24 L7-13]

Defendant Miller prepared the Banfield's Form 1040 [TR P14 L22 to 25] Defendant Thompson prepared the pension plan form 5500 [TR P15 1-13] and did the accounting work for the plan [TR. P27, L

18-19] and provided the amount of the deductions for the Corporation 1120 [TR P30 L23] and were paid for their services in the plan [TR P16 L13].

Defendant Miller stated that another accountant did the payroll between 1977 and 1985.

Defendant Miller stated that Dr. Banfield's private practice and AAELO had physically segregated offices [TR P19 L22].

Defendant Miller acknowledges in Plaintiff's Exhibit 8 the amount of contributions given from Dr. Banfield's private practice to the pension plan total [TR P20 L21 to Tr P22 L21]. A review of the Exhibit 8 indicates that Dr. Banfield's private practice income to

the plan exceeded the contribution for the integrated plan.....Further Defendant Miller indicated that he did not recall

Section E (x)

Now comes Darlene Banfield, Appellant, Counsel to submit to this Honorable Court this Petition for rehearing of the above cause on all issues presented for review and in support, respectfully show;

1) On September 12, 1995, this Court rendered its decision in favor of Appellees Kenneth W. Turner, et al., and against Appellants Darlene Banfield, Executrix; etc... et al., affirming

the judgment of the District Court.

2) Appellant seeks a rehearing on the following grounds:

The Appellant believes that the decision of this Court of Appeals has overlooked the application and failed to apply nearly all the applicable substantive tax and pension law set forth in Appellants Brief including but not limited to: Lucas v. Earl, 281 U.S. 111, 74 L.Ed. 731 (1930); United States v. Basye 93 S.Ct. 1080, 410 U.S. 441, 35 L.Ed 2d 412 (1973); Pleason v. Comr. 226 F.2d 732 (7th Cir 1955); Hogle v Comr, 132 F.2d 66 (10th Cir 1942); P.R. Farms, Inc. v. Comr, T.C. Memo 1984-549 affd 820 F.2d 1084 (9th Cir 1987);

Professional & Executive Leasing, Inc. v C.I.R., (1987) 89 TC 225, affd (9th Cir 1988) 862 F.2d 751; Peckman v Board of Trustees, 653 F.2d 424 (10th Cir 1981); Chase v. Trustees of W. Con. of T. Pension T.F., 753 F.2d 744 (9th Cir 1985); Giordano v. Jones, 867 F.2d 409 (7th Cir. 1983)i Kwatcher v. Mass. Service Emp. Pension Fund 879 P.2d 957 (1st Cir 1989); Jamail, Inc. v. Carpenters District Council of Houston Pension & Welfare Trust, 954 F.2d 299 (5th Cir. 1992); Wells v. U.S. Steel & Carnegie Pension Funds, Inc., 950 F.2d 1244 (6th Cir. 1991). Further, The Appellant ask for a review of all cited Internal Revenue Code provisions and regulation previously cited in the

Appellants-brief including but not limited to I.R.C. Section 400 et seq., which includes provisions as to leased employees, definition of employer, employees, contributions, qualification for a qualified plan, and other pertinent provisions.

The opinion of this Court held that Appellant failed to produce evidence which rose to the level of creating a genuine issue of material fact and that Appellee's were entitled to judgment as a matter of law.

The first paragraph on page 2 of this court opinion, the facts stated were "...Dr...Banfield...owned half of an incorporated medical practice called...AAELO. Defendant Turner owned

the other half of AAELO. Dr. Banfield had a separate private medical practice."

Continuing in that same paragraph, the Court held "...Dr. Banfield apparently contributed income from his separate private practice into the AAELO fund" (i.e. two defined benefit pension plans)- The Court supports its own findings by stating at the top of page 3, The Moskal Report also found that "the private practice income did flow through tho the pension plans..."

It is the funding mechanism of the pension plan that is the negative, (i.e. the Appellant failed to produce evidence to created a genuine issue of material fact.) The Appellant states that opinion

failed to discuss whether the funding mechanism was proper under law; the factual basis for the funding mechanism lease employee vs. assigned income; and as the fiduciaries knew of the mechanism (actually suggested that the plan take on the structure (i.e. permit the Court found "Dr. Banfield...(to) contribute income from his separate private practice)), was this funding-structure so flawed as Appellant contents, to raise the level of a breach of fiduciary duty to enhance the benefits of Dr. Banfield if he was the source of the pension contributions (albeit as Appellant argues improper contributions to the AAELO plan).

This Court opinion fails to discuss these material and Appellant believes dispositive issues. Please tell Mrs. Banfield,

Section E (xi)

Excerped from Gallagher Deposition

2/07/94

Citation in text of writ are verbatum cites not duplicated here

18 Q: What was your basis or reason that
19 you recommended that Dr. Banfield's private practice
20 income be placed in AAELO?
21 A: Our recommendation was based on the fact that would give Dr. Banfield the ability to tax shelter more dollars . . .

Page 40

1 Q: When you say tax shelter, what type of tax?

3 A: income tax.

4 Q: This would be 1040 taxes...

6 A: Salary, wages, whatever; right.

Page 55

22 Q: When I make a contribution to a plan on a defined benefit plan, doesn't the plan contributions benefit all the beneficiaies of the plan?

25 A: yes

Page 57

12 Q: How would you deal with an underfunding situation? You' re saying a corporation would make up the underfunding?

15 A : Yes

Page 62

16 Q: In a defined benefit plan, is a seperate plan participant's account established for the participant?

18 A: No

Page 64

8 Q: In this case, was Dr. Banfield's contribution what's commonly called a VSO voluntary savings option.

11 A: Dr. Banfield did not make any contributions.

19 Q: If a voluntary savings option is made as a part of the plan, would the VSO be segregated to the plan participants?

23 A: It wouldn't necessarily be segregated physically, but in a seperate accounting would be kept...

Page 65

13 Q: was a seperate participant's account established for Dr. Banfield?

16 A: The monies received by the corporation were treated as just receipts..."

Section E (xii)

Herr Affidavit

Par 9 In my opinion, the following errors were made in the establishment and administration of the two pension plans sponsored by AAELO.. . . The necessary documents should have been drawn up [for the leased emplyee] and put in place. I hold Mr. Gallagher, his firm, and/or B.J Thompson & Associates, Inc primarily responsible, and William Miller and/or his firm secondarily responcible, for allowing this error to take place.

(i) There were cleaner and simplir stratigies available to accomplish the

goal of utilizing Dr. Banfield's private practice income in the providing of retirement benefits soley to him ... and to the extent that these avenues were not explored nor proposed is an error on the part of the aformentioned parties.

h. I reviewed the "Confidential Report" prepared by the firm of Moskal Jaras dated January 1991. The report makes two important conclusion: that the benefit and distribution clculation made by Gallagher... were reasonably correct; and that Dr. Banfield's contributions into the two plans matched the benefits that he received from the two plans. That last point, however, is regrettably inaccurate. Page 14 of the Confidential Report details all the contributions made

into the plans. Note that none of Dr. Banfield's additional contributions(sourced from his private practice income) representing 24% of the total contributions, yet he received 0% back in benefits. T have designed a retirement program yielding this type of result is additional evidence of the error committed by Gallagher, his firm or B.J. [Thompson & Associates].

i. One other comment regarding the Confidential Report discussed above in subparagraph h. In the calculation of Dr. Turner's retirement benefits, the Report details tht his five year average compensation is based on years 1986 through 1990. The record indicated that AAELO was dissolved... December 31, 1988.

The record further indicates that the new partnership of Dr. Turner and Dr. Dubin did not take over the plan sponsorship of the AAELO plans. Therefore, if Dr. Turner was no longer earning compensation from AAELO, how could his retirement benefits be based upon compensation in 1989 and 1990...

I hold Miller and/or his firm primarily responsible for this error... Gallagher and his firm secondarily responsible.

Section E (xiii)

AFFIDAVIT OF MARTIN JARAS

I, Martin A. Jaras, having been duly sworn state as follows:

1. I, Martin A. Jaras, CPA am over the age of 18 years old, and a citizen of the United States.

2.. I have been retained, in my capacity as Senior Consultant with the administration and actuarial firm of Compensation Systems, Inc. of America, by

Darlene Banfield, Executrix of the estate of Harlow Banfield, to review the establishment and funding of two (2) qualified Pension Plans of Anesthesia Associates of East Liverpool, Ohio, Inc. (AAELO), which Plans are the subject matter of Case No. 4:92 CV 02566 filed in the U.S. Federal District Court.

3. I had previously given a report in my capacity as employee of Moskal Jaras Klein (administrators & actuaries). The report was titled "Evaluation of Distributable Benefits from Defined Pension Plans of Anesthesiology Associates of East Liverpool, Ohio, Inc.", and dated January, 1991,

4. After reviewing the additional records provided by Darlene Banfield and Attorney William McGuire, it is my opinion tht Dr. Banfield assign his income from his private practice to the AAELO Corporation in order to provide additional liquid funds to make required Pension Plan contributions.

A) I do not think this assignment of income was proper and it should have been reported to the IRS on a form Schedule C as an attachment to Dr. Banfield's personal 1040 tax returns. Dr. Banfield maintained a separate business checking account for his private practice, and should have reported the profits and losses of this entity.

B) The private practice of Dr.

Banfield could have adopted, as co-sponsor, the AAELO Pension Plan in order to make contributions and earn benefits pursuant to the Plan provisions and thereby avoided the assignment of income situation.

5. The Defined Benefit type of pension plan provides benefits based on historical earnings of the Plan participants. The benefits are not related to who or what entity contributes funds to the Plan. Accordingly, Dr. Banfield gained no benefit from diverting his private practice income though AAELO and subsequently into the Pension Plans. He would have received the same ultimate benefit if he never made any contributions from his private practice.

A) According to the January, 1991 "Evaluation Report" page 14, Dr. Banfield had private practice income of $272,384 form 1979 to 1985. Apparently this was assigned to the Corporation.

B) If Dr. Banfield or AAELO maintained a Defined Contribution Plan (ie: Profit Sharing, Money Purchase or Target Benefit) additional contributions made from Dr. Banfield's assigned income would have increased his account balance and ultimate benefits.

6. In reviewing Judge White's Summary Judgment Decision, I find that the private practice income of approximately $272,384 contributed by Dr. Banfield is not included in the 62% figure. If it were, Dr. Banfield would have contributed

much more that 62% and still received only 62% of the Plan benefits.

7. There were five (5) separate loans from the Pension Plans to Dr. K.W. Turner. There is evidence that loan repayments were made, and the outstanding balances due at the time of termination of the Plans were treated as a portion of Turner's final distribution (ie: an offset tot his actuarially determined benefit).

A) A review of the loan transaction indicates that Turner's loan balances should have been $3,875 greater at the time of distribution. Therefore, he received $3,875 too much in the cash portion of the distribution. (See

Attached Exhibit A)

8. Further affiant sayeth naught.

STATE OF OHIO)
)SS
COUNTY OF CUYAHOGA)

Martin A. Jaris

Before me, a Notary Public in and for said County and State, personally appeared Martin A. Jaras, who acknowledged that he did sign the foregoing instrument and that the same is his free act and deed.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my Notarial Seal at Euclid, Ohio this 19 day of August, 1994.

Notary Public

AFFIDAVIT OF DARLENE BANFIELD

I Darlene Banfield, having been duly sworn states as follows:

1. I, Darlene Banfield, am over the age of 18 years old and a citizen of the United States.

2. The affiant was the wife of Harlow F. Banfield from August 28, 1971 to the date of death of Harlow F. Banfield on February 17, 1989.

3. The affiant states that Dr. Harlow F. Banfield did not trust Dr. Turner and that their relationship was not amicable. Affiant also believes Rose Gabbert's deposition supports the allegations that Rose Gabbert knew Dr. Banfield was concerned about money matters.

4. Affiant states that the attached Bank records of Crestar Bank N.K.A. Bank One indicate that the AAELO Pension checking account had a balance of $2,975 on December 21, 1989 and Intergrated Plan had a balance of $7,262.68 on December 21, 1987 and that to her knowledge she has received no benefit therefrom and the person or persons to whom it was distributed are unknown. Futher, based

upon informtion and belief, affiant states those accounts (i.e. Misters Turner, Gallagher, or Miller) distributed beneficiaries or estate. Further affiant has requested numerous times from Kenneth W. Turner; William Miller, and Crable, Visnic and Miller, and B.J. Thompson and Associates, Defendants herein, to provide an accounting of such pension plan accounts and AAELO, Inc. corporate accounts and that none of said defendants has provided such information and have failed and refused to provide such information after repeated requests. Affiant also attaches copies of checks of pension and integrated plan attached hereto and be made a part hereof.

5. That at the time of establishing the Integrated Pension Plan, Mr. Gallagher and Mr. Turner, defendants herein, indicted and represented to Dr. Banfield though his private practice contributions to such plan, he would be receiving a "bigger piece of the pie" when in fact as now known by the affiant, Dr. Banfield was contributing to a defined benefit pension plan which would calculate the same benefits payable to Dr. Banfield irregardless of whether Dr. Banfield contributed his private practice income to such plan.